REASONS FOR GRANTING THE PETITION

I. THE BAN ON PERSONAL SOLICITATION RAISES AN ISSUE WORTHY OF REVIEW

The en banc decision of the Eighth Circuit striking down the solicitation clause raises fundamental questions of First Amendment law. The majority focused on the wrong precedent from this Court, applied an incorrect level of scrutiny, and missed the crucial state interest. Allowing judges to make personal solicitations for campaign funds permits the perception that justice can be bought. The solicitation clause thus plays a vital role in preserving public confidence in the judiciary.

At least twenty eight states have clauses prohibiting solicitation by judges. Multiple state supreme courts promulgating or applying these clauses have viewed them as constitutional and at least one federal circuit—the Third Circuit—has squarely upheld a solicitation clause. The decision of the Eighth Circuit (and a similar decision from the Eleventh Circuit) conflict with this substantial body of precedent. This Court should clarify the validity of these clauses immediately.

A. The Court of Appeals Erred In Striking Down The Solicitation Clause

The Eighth Circuit took as its framework for analysis this Court's decision in *White*. 416 F.3d at 748-54. "[U]pon further consideration of the . . . solicitation clause[] in light of *White*," it held that this clause did not survive strict scrutiny. *Id.* at 766. *White*, however, was not the right precedent for analyzing the solicitation clause.

The solicitation clause is about requests for money—specifically, whether judicial candidates may personally ask members of the public, including those who have appeared or might thereafter appear before them, for monetary

contributions. In a series of cases from *Buckley v. Valeo*, 424 U.S. 1 (1976), to *McConnell v. FEC*, 540 U.S. 93 (2003), the Court has addressed the regulation of monetary contributions and the manner in which those contributions are solicited. But rather than apply this established case law, the Eighth Circuit largely cast it aside, focusing instead on *White*.

Symptomatic of its difficulties, the Court of Appeals dismissed *McConnell* because "the Supreme Court, in *McConnell*, did not once cite *White* in the entirety of its 251-page opinion dealing with the corrupting influence of 'soft' money and the political communications such money can buy." 416 F.3d at 756 n.8. But *White*, of course, dealt only with the announce clause—an issue unique to judicial elections—and was not concerned at all with monetary contributions. It is therefore not surprising that the *McConnell* Court did not mention *White*.

Just as the Court of Appeals chose the wrong precedent, it applied the wrong standard of review. The majority applied strict scrutiny, reasoning that "[i]nsofar as the solicitation clause restricts the amount of funds a judicial candidate is able to expend on his or her political message, the regulation is of the same caliber as that struck down in *Buckley*." 416 F.3d at 764.

In *Buckley*, however, the Court applied a lower level of scrutiny to contribution limitations, and in fact upheld the limits. 424 U.S. at 23-36. Since *Buckley*, the Court has "consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption." *McConnell*, 540 U.S. at 138 n.40. This principle applies to solicitation of contributions as well as the contributions themselves. *Id.* at 138 ("[F]or purposes of determining the level of scrutiny, it is irrelevant that Congress chose ... to regulate contributions on the demand rather than the supply side."); *FEC v. Nat'l Right to Work*

Comm., 459 U.S. 197, 206-11 (1982) (upholding a restriction on political action committees' solicitation of contributions).

The Eighth Circuit's theory—applying strict scrutiny to limitations on contributions because they affect the aggregate amount available for expenditure—conflicts with the entire body of case law recognizing a distinction between contribution and expenditure limits. *See, e.g., Buckley*, 424 U.S. at 23-36. It also misses the point that this particular solicitation clause is actually *less* restrictive than the contribution ceilings that the Court has upheld. The solicitation clause does not actually restrict the ability of potential donors to contribute to the judicial candidate's campaign, nor does it restrict the ability of a committee to solicit such contributions.

For all of these reasons, the solicitation clause should have been subjected to the much more lenient test of *McConnell*—whether it "satisfies the lesser demand of being closely drawn to match a sufficiently important interest." 540 U.S. at 136 (internal quotations omitted). As the dissenting judges below recognized, the standard of review is, at the very least, an issue "worthy of more attention." 416 F.3d at 783 n.22 (Gibson, J., dissenting).

Even applying strict scrutiny, however, the solicitation clause could have been upheld, had the Court of Appeals fully understood and credited Minnesota's underlying interest. Since *Buckley*, this Court has recognized the risk that candidates might be too willing to acquiesce in the wishes of contributors and the associated corrosive effect of the appearance of such bias. Both interests are especially compelling with respect to judicial elections. The Third Circuit has explained:

> It is no secret that . . . judicial campaigns must focus their solicitations for funds on members of the bar. This leads to the unseemly situation in which judges preside over

> cases in which the parties are represented by counsel who have contributed in varying amounts to the judicial campaigns.... There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.

Stretton v. Disciplinary Bd. of the Supreme Ct. of Pa., 944 F.2d 137, 145-46 (3d Cir. 1991).

The worst aspect of this problem is the personal involvement of the judicial candidate in the solicitation. It not only threatens the relationship between the judge and the potential donor, it projects a uniquely unwholesome image to the public. An umpire who asks the players on each team for money will not be seen as the right person to call the game. As the Supreme Court of Oregon reasoned:

> The impression created when a lawyer or potential litigant . . . contributes to the campaign of that judge is always unfortunate. . . . [T]he outside observer cannot but think that the lawyer or potential litigant either expects to get special treatment from the judge or, at the least, hopes to get such treatment. It follows that, if it is at all possible to do so, the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.

In re Fadeley, 802 P.2d 31, 41 (Or. 1990).

The Eighth Circuit majority agreed that impartiality as to parties could be a compelling interest, but only to the extent that a particular compromise of impartiality amounted to a denial of due process. 416 F.3d at 753. The majority then concluded that a contribution solicited in the fashion proposed by the plaintiffs would not amount to a due process violation because the committee would receive the funds and

the judge would not know about the source of the contribution. *Id.* at 765.

This factual conclusion was not appropriate in a summary judgment setting, but, more importantly, the basic premise of the reasoning is incorrect. The State's interest in assuring a fair and impartial hearing is not limited to preventing misconduct so egregious that it amounts to a denial of due process. *See* Petition at 15 (citing cases). States regularly do more to assure a fair judicial process than what is minimally required by the Fourteenth Amendment.

Perhaps most important, the Eighth Circuit considered only whether solicitation would lead to an *actual* bias. But, as this Court has repeatedly held, the State has an interest in guarding against the appearance, as well the actuality, of corruption. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001). Here, the State has a strong interest in avoiding any inference by the donor, the opponent, or the public at large that the judge was using his or her office as a means of exacting contributions. It is this threat to the appearance of impartiality that serves as the compelling foundation for the solicitation clause, and it is not discussed at all by the majority opinion.

B. The Decision Exacerbates Confusion Over Restrictions On Personal Solicitation

The en banc decision of the Court of Appeals deepens the confusion over the viability of solicitation rules among states that conduct judicial elections. At least twenty eight states currently ban personal solicitation by judicial candidates. *See* Petition at 13 (citing codes). The states' ability to enforce these prohibitions has been seriously jeopardized.

Two federal circuits have now struck down these rules. In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the

Eleventh Circuit concluded that this Court's decision in *White* required invalidation of Georgia's ban on personal solicitation. *Id.* at 1322-23. Its opinion contained no discussion of campaign contribution precedent, such as *Buckley*. The Eighth Circuit, in turn, relied on *Weaver*. 416 F.3d at 763. Together, these circuits encompass ten states that conduct judicial elections.

On the other hand, since *Buckley*, other courts have sustained solicitation clauses against First Amendment challenge. *See Stretton*, 944 F.2d at 145 (citing *Buckley* in upholding Pennsylvania's solicitation clause); *In re Fadeley*, 802 P.2d at 41 (citing *Buckley* in upholding Oregon's solicitation clause); *cf. McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1325, 1335 n.10 (Fed. Cir.) (sustaining Hatch Act prohibition on personal solicitation by candidate for local office), *cert. denied*, 126 S. Ct. 381 (2005).

Following *White*, many state supreme courts amended their judicial codes to ensure consistency with the First Amendment principles articulated in the Court's opinion. But, notably, nearly all left their solicitation clauses undisturbed. *See, e.g.*, 42 Pa. Cons. Stat. Ann., Code of Jud. Cond., Canon 7B(2) (amended Nov. 21, 2002) (leaving solicitation clause in place); Order, In re Amendment to Rule 10, Rules of the Tennessee Supreme Court (Tenn. Oct. 11, 2005) (leaving solicitation clause unchanged); Order, In re Amendment of Supreme Court Rules, No. 00-07, 2004 WI 134, 274 Wis. 2d xlvii (Wis. Oct. 29, 2004) (clarifying but not withdrawing prohibition on solicitation).[3]

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[3] Similarly, less than a month ago, the American Bar Association reaffirmed its belief in the constitutionality of the solicitation clause. *See* ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Final Draft Report, Rule 5.01(A)(8) (Dec. 14, 2005) (continuing to ban personal solicitation).

Even within the federal circuits that invalidated these rules, some States have changed them, others have not. For example, two of the three States in the Eleventh Circuit have dropped their prohibitions on personal solicitation in light of *Weaver*, *see* Ga. Code of Jud. Cond., Canon 7B(2) (amended June 7, 2004); Ala. Canons of Jud. Ethics, Canon 7B(4) (Aug. 25, 2004), while one has not. *See* Fla. Code of Jud. Cond., Canon 7C(1); Amendment to Code of Jud. Cond., Canon 7 (Political Activity), No. SC01-1904 (Fla. Mar. 10, 2005) (leaving solicitation clause in place). In the Eighth Circuit, South Dakota eliminated its solicitation clause in the wake of the en banc ruling, S.D. Code of Jud. Cond., Canon 5C(2) (amended Dec. 1, 2005), while the other four states with solicitation clauses have retained theirs. *See* N.D. Code of Jud. Cond., Canon 5C(2); Ark. Code of Jud. Cond., Canon 5C(2); Mo. S.Ct. Rule 2.03, Canon 5B(2); Neb. Code of Jud. Cond., Canon 5C(2).

Of course, some federal circuits have not spoken to this issue. However, in this context, federal courts rarely speak. State supreme courts have responsibility for promulgating and applying the ethical rules. Federal courts hear challenges to them only in injunction or declaratory judgment actions and frequently dismiss them on abstention grounds. *See Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); *Allstate Ins. Co. v. West Virginia State Bar*, 233 F.3d 813 (4th Cir. 2000); *Butler v. Ala. Judicial Inquiry Comm'n*, 261 F.3d 1154, 1160 (11th Cir. 2001); *Griffen v. Arkansas Judicial Discipline & Disability Comm'n*, 266 F. Supp. 2d 898 (E.D. Ark. 2003). Hence, the actions of state courts in promulgating and applying their rules have special significance in this area.

The confusion in the courts has real consequences for those planning to compete for judicial office. Judicial candidates do not know how they or their opponents can

legitimately seek funds. As noted in the petition (at 11), thirty states will hold supreme court elections next year; the significant uncertainty surrounding this issue threatens the fairness of those elections. By any measure, this Court's consideration of the issue is warranted.

II. THE BAN ON PARTISAN ACTIVITIES RAISES AN ISSUE WORTHY OF REVIEW

The Eighth Circuit's ruling striking down Minnesota's restrictions on partisan activities also raises important, pressing issues requiring resolution by this Court. Again, the en banc majority took *White* as its lodestar, although the reasoning in that case did not apply. The majority gave short shrift to the decisions of this Court actually addressing restrictions on partisan activity by government employees. The majority did not recognize the critical importance of the state's interest in assuring a perception of judges as impartial decision-makers, without obligations to political parties.

The Eighth Circuit's ruling conflicts with a significant number of recent state court decisions upholding similar restrictions. As a result, the rules on judicial participation in partisan activities have become as confused and disputed as those on solicitation.

A. The Court of Appeals Erred In Striking Down The Partisan Activities Clause

At the core of the majority opinion is a misperception of the scope of *White*. The central problem that concerned the Court in *White* was the lack of fit between a direct restriction on speech about issues and the State's interest in preserving impartiality as to parties. The clause failed strict scrutiny because it was "barely tailored to serve that [lack of bias] interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *White*, 536 U.S. at 776. In contrast, the partisan activities clause regulates relationships between the

judge and certain parties—the political parties. Judge Gibson explained in his dissent:

> The threat to open-mindedness at which the partisan activities and solicitation clauses aim comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election. . . . The partisan activities and solicitation clauses regulate how certain speech affects a judicial candidate's relations with people, . . . not the candidate's relations with issues.

416 F.3d at 768.

Because the partisan activities clause is aimed at a different problem, *White* simply does not provide an answer to the constitutional question that the clause poses. But there is other, more relevant, precedent that strongly supports the constitutionality of the partisan activities clause. In *United States Civil Service Commission v. National Association of Letters Carriers*, 413 U.S. 548 (1973), this Court upheld the restraints of the Hatch Act on partisan activity by Executive Branch employees precisely because they are "expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Id.* at 565. The Court held that "to serve this great end of Government—the impartial execution of the laws—" it was permissible to prohibit, among other things, executive employees from running for office on partisan political tickets. *Id. Letter Carriers* was a strong precedent, pertinent to and perhaps decisive of the question before the Eighth Circuit, but was not considered in the majority opinion at all.

Of course, *Letter Carriers* dealt only with restrictions on employees of the executive branch of government. But the reasoning applies with even greater force to the judicial

branch. The central purpose of that separate branch is to provide a forum in which citizens may obtain a decision free of bias. Moreover, the judiciary is expected to perform functions that require independence from political parties. Elected state judges must review the validity of state laws under the state and federal constitutions; they must review actions of the state executive branch; and they must interpret and apply the laws and rules adopted by the other two branches. In each case, the law, regulation, or executive action at issue will be engendered through political debate and activity in the other branches. Yet the public expects the court to perform its role with impartiality, and without regard to the partisan source of the legislation. It is therefore "crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it." 361 F.3d at 1044. The judicial role requires independence from the political branches, and from the political parties that dominate them.[4]

Minnesota's Constitution recognizes the need to protect the impartiality and independence of judges. It contains provisions protecting the structure and jurisdiction of the courts from legislative control, art. VI, §§ 2-4, 7, 11-3, allowing the judiciary to select its own employees, art. VI, § 2, and prohibiting judges from holding other governmental office, art. VI, § 6. "[T]he founders of [Minnesota's] system of government intended to confine the courts to their judicial

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[4] The Eighth Circuit assumed that judicial recusal could address bias in cases where a political party formally appeared. 416 F.3d at 755. But, apart from the difficulty of finding a nonpartisan judge in a world of partisan endorsements, the problem is much broader than those cases in which political parties are courtroom parties; it arises in every case in which political parties have a strong interest—a very wide spectrum of cases dealing with the most important issues to face a state court in a given year. Recusal is not a practical solution.

duties, and thus prevent them from becoming involved in the turmoil of political life." *State ex rel. Young v. Brill*, 111 N.W. 639, 650-51 (Minn. 1907).

Judicial elections are also a fundamental part of Minnesota's scheme to preserve the impartiality and independence of judges. *See* Wendy Weiser, *Regulating Judges' Political Activity After White*, 68 Alb. L. Rev. 651 (2005). As the petition (at 2) explains, nonpartisan judicial elections were viewed as a means of avoiding the partisanship involved in the distribution of judgeships through political appointments. Necessary to this reform, in the view of Minnesotans, was a restriction on partisan activity by the judges themselves.

This Court has previously recognized the strength of the State's interest in protecting judges from partisan entanglements. In *Clements v. Fashing*, 457 U.S. 957, 968 (1982), the Court upheld state rules requiring that judges resign from their judicial positions before running for another office. The Court recognized that a State could take into account the need to avoid the reality or appearance of partisanship on the bench:

> A campaigning [judge] might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office. The State's interests are especially important with regard to judicial officers. It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents.

Id. at 968. *Clements*, with its useful guidance, was not weighed by the Eighth Circuit. If a State can require a judge to resign his position entirely before pursuing a political office, it seems reasonable a State could adopt the much less

intrusive measure of forbidding certain forms of partisanship in connection with judicial elections.

In striking down the partisanship provisions, the Court of Appeals reasoned that they did not forbid all other forms of partisan activity by prospective judges, such as membership in interest groups or political activity before they ascend the bench. According to the majority, this rendered the regulation fatally underinclusive. However, this Court has repeatedly held that "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *McConnell*, 540 U.S. at 207-08 (quoting *Buckley*, 424 U.S. at 105).

Given the unique place of political parties in American elections, it was entirely reasonable for Minnesota to limit its regulation to the specific problem posed by political parties. Political parties specialize in electing candidates, and have a powerful machinery dedicated to achieving that end. As a result, parties are in a much stronger position than other organizations to demand and hold the loyalty of an elected candidate. Indeed, this Court upheld that this distinction in *McConnell*: "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. . . . Political parties have influence and power . . . that vastly exceeds that of any interest group." 540 U.S. at 188. Thus, the Eighth Circuit's underinclusiveness analysis also raises questions worthy of review.

B. The Decision Exacerbates Confusion About The Ability To Restrict Partisan Activity

The overwhelming majority of states (and the United States) currently ban partisan activity by judicial candidates,

sitting judges, or both.[5] The Eighth Circuit's decision creates deep uncertainty about the validity of these provisions and a need for clarification from this Court.

To be sure, the Eighth Circuit's decision is consistent with two district court decisions in this area. *See O'Neill v. Coughlan*, Case No. 1:04CV1612, slip op. at 9-10 (N.D. Ohio Sept. 14, 2004) (order granting TRO because "judicial candidates are entitled to state their party affiliation or membership in any medium or venue, at any time"); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 80 (N.D.N.Y.) (partisan activity clause is impermissible prior restraint), *vacated*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004).

However, the Eighth Circuit's decision is inconsistent with a recent decision of the Federal Circuit. In *McEntee v. Merit Systems Protection Board*, 404 F.3d 1320 (Fed. Cir. 2005), a federal employee wished to run for mayor in an election that, like Minnesota's judicial elections, was nonpartisan. *Id.* at 1322. While this was permissible under the Hatch Act, the employee also engaged in partisan activity throughout his campaign, including seeking and using political party endorsements. *Id.* at 1324. The Board found that, by injecting partisanship into his campaign, the employee had violated the Hatch Act, and the Federal Circuit affirmed. *Id.* at 1324-25, 1335. The Federal Circuit upheld the government's ability to restrict partisan activity by candidates in nonpartisan elections—precisely the effect of

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[5] *See* Petition at 16. Most state restrictions on political activities are analogs to the ABA Model Code. *See* Model Code of Judicial Conduct, Canon 5 (1990). Within the last month, the ABA has reiterated its belief that political activity restrictions are constitutional. *See* Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Final Draft Report, Rule 5.01(A) & cmt. (Dec. 14, 2005).

the restriction struck down by the Eighth Circuit. In contrast to the Eighth Circuit, the Federal Circuit relied on *Letter Carriers* and explained that this Court's decision in *White* did not alter the analysis. *See id.* at 1332 n.7. These two circuit decisions are plainly at odds.

In any event, as with the solicitation clause, the lead role in assessing and applying such ethical constraints lies with the state courts of last resort. Their judges find themselves serving at once as drafters of the rules, interpreters of the rules, and candidates subject to the rules. The overwhelming majority of state courts that have considered limits on partisan activities have sustained them against constitutional challenge.

Some courts have sustained them in specific grievance proceedings. *See In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (upholding ban on participation in partisan political activity by judicial candidates and sitting judges); *In re Dunleavy*, 838 A.2d 338 (Me. 2003) (upholding provisions requiring resignation of judge before running for political office), *cert. denied*, 541 U.S. 960 (2004); *cf. Griffen v. Arkansas Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 533, 535-36 (Ark. 2003) (upholding, in concept, code provisions banning political activities of judges, while deciding that a particular exception to the provisions caused them to be unconstitutionally vague).

Others have found restrictions on partisan activities to be constitutional in the context of promulgating those rules. For example, after *White*, the Wisconsin Supreme Court by a slim majority passed new court rules that impose *more stringent* limits on political activity of judicial candidates than under its previous rules. *See* Order, In re Amendment of Supreme Court Rules, No. 00-07, 2004 WI 134, 274 Wis. 2d xlvii (Wis. Oct. 29, 2004). The new rules essentially require that the existing rules limiting partisan activities of sitting judges will now equally apply to judicial candidates. *Id.*

Even those courts that believe partisan-activity restrictions must be lifted in light of *White* do not agree on *which* partisan-activity restrictions are affected. For example, South Dakota, after considering the Eighth Circuit's decision, adopted new rules allowing its judges and judicial candidates to "attend political gatherings," but still prohibiting a judge or judicial candidate from, among other things, "mak[ing] speeches on behalf of a political organization" and "publicly endors[ing] . . . another candidate for public office." *See* S.D. Code of Jud. Cond., Canon 5A(1)(c) (amended Dec. 1, 2005). North Carolina, after *Weaver*, went further, now allowing a judge or judicial candidate to "attend, preside over, and speak at any political party gathering," as well as "endorse any individual seeking election to any office." *See* N.C. Code of Jud. Cond., Canon 7B(4) (amended Apr. 2, 2003). Although differing state rules sometimes reflect a healthy difference in policy choices, here they reflect a decidedly unhealthy confusion about whether, or to what extent, those rules can exist at all.

The confusion over ethical restraints on partisan activities is well illustrated by the situation in New York. There, the federal district court enjoined enforcement of restrictions on partisan activity with broad reasoning: "[A] rule prohibiting an elected judge or judicial candidate from participating in politics is not narrowly tailored to serve the state's interest in an independent judiciary." *Spargo*, 244 F. Supp. 2d at 89. A few months later, the highest court of New York upheld such restrictions. *In re Raab*, 793 N.E.2d at 1289-94. It analogized the case to this Court's *Letter Carriers* decision. The court also observed, "The State's interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the appearance of corruption stemming from public awareness of the opportunities for abuse." *Id.* at 1291 (citations omitted). The federal decision has since been

vacated on *Younger* abstention grounds. 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). Thus, the situation in New York, as elsewhere, remains uncertain.

CONCLUSION

Judges across the country are struggling to understand the disciplinary rules applicable to them:

> Today's judicial landscape is a complicated patchwork of restrictions on judges intermingled with First Amendment considerations. And judges are attempting to make sense of this patchwork. . . . [T]hey need guidance as to the interplay between First Amendment principles, judicial codes of conduct, and their own leadership roles. . . . [G]uidance at this time . . . is paramount.

Griffen, 266 F. Supp. 2d at 908. The questions at issue in this case are of immediate importance for many States and their ongoing judicial elections. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 05-566

IN THE

Supreme Court of the United States

MARTA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JUDICIAL ETHICS AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and to what extent the State of Minnesota may, in order to protect the fact and appearance of judicial integrity, independence, and impartiality, restrict candidates in non-partisan judicial elections from (a) engaging in partisan political activity and (b) personally soliciting campaign contributions, without violating the free speech and free association rights of judicial candidates under the First Amendment to the United States Constitution.

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INTEREST OF *AMICI CURIAE*[1]

Judicial Ethics and Constitutional Law Scholars Leslie W. Abramson, James J. Alfini, Erwin Chemerinsky, Mary C. Daly, Stephen Gillers, Andrew L. Kaufman, Steven Lubet, Carrie J. Menkel-Meadow, Thomas D. Morgan, Robert M. O'Neil, Burnele Venable Powell, Ronald D. Rotunda, and

[1] This brief is filed with the consent of all parties. Pursuant to Rule 37.6, the *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than the *amici curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

Jeffrey M. Shaman submit this brief as *amici curiae* in support of the petition for writ of certiorari in this case.

The *amici curiae* are law professors who have studied and written extensively about judicial ethics, professional responsibility, and/or the First Amendment. The *amici curiae* have chaired, served on, or advised various committees of the American Bar Association (ABA), state and local bars, and/or state courts that regulate judicial ethics or professional responsibility, and have provided legal advice regarding the application of restrictions on the speech and conduct of candidates for elected judicial office. Specifically:

Leslie W. Abramson is a Professor of Law at the Louis D. Brandeis School of Law at the University of Louisville. He is the author of *Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* (2d ed. 1992).

James J. Alfini is the President and Dean of the South Texas College of Law. He is a member of the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct (which is currently proposing revisions to the ABA's Model Code regarding the speech and conduct of candidates for elected judicial office), but he is a signatory to this brief in his personal capacity and not as a representative of the ABA Joint Commission, which has not taken any position on this matter. He is the co-author (with *amici curiae* Jeffrey M. Shaman and Steven Lubet) of *Judicial Conduct and Ethics* (3d ed. 2000).

Erwin Chemerinsky is the Alston & Bird Professor of Law at the Duke University School of Law. He is the author of *Constitutional Law* (2d ed. 2005), *Federal Jurisdiction* (4th ed. 2003), and *Constitutional Law: Principles and Policies* (2d ed. 2002).

Mary C. Daly is the Dean of St. John's University School of Law and holds the John V. Brennan Chair of Law and Ethics. She has served as chair of the Committee on Professional and Judicial Ethics of the Association of the Bar

of the City of New York, Reporter to the New York State Bar Association Task Force on the Profession, Reporter for the ABA Commission on Multidisciplinary Practice, and Member of the ABA Standing Committee on Professional Discipline. She is the co-editor of *Rights, Liability and Ethics in International Legal Practice* (2d ed. forthcoming) and *The New York Code of Professional Responsibility: Opinions, Commentary, and Caselaw* (1997 and 2005 supp.).

Stephen Gillers is the Emily Kempin Professor of Law at the New York University School of Law. He is the author of *Regulation of Lawyers: Problems of Law and Ethics* (7th ed. 2005) and *If Elected, I Promise: What Should Judicial Candidates Be Allowed to Say?*, 35 Ind. L. Rev. 735 (2002).

Andrew L. Kaufman is the Vice-Dean for Academic Programming and the Charles Stebbins Fairchild Professor of Law at the Harvard Law School. He has served as a member of the Massachusetts Supreme Judicial Court's Advisory Committee on Judicial Ethics and as a member of its Committee to revise the Massachusetts Code of Judicial Conduct. He is the co-author of *Problems in Professional Responsibility for a Changing Profession* (4th ed. 2002) and the author of *Judicial Correctness Meets Constitutional Correctness: Canon 2C of the Code of Judicial Conduct*, 32 Hofstra L. Rev. 1293 (2004).

Steven Lubet is the Director of the Program on Advocacy and Professionalism and a Professor of Law at the Northwestern University School of Law. He is the co-author (with *amici curiae* Jeffrey M. Shaman and James J. Alfini) of *Judicial Conduct and Ethics* (3d ed. 2000), the co-author of *Exercises and Problems in Professional Responsibility* (2d ed. 2001), and the author of *Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges* (1985) as well as more than sixty articles on judicial ethics and lawyers' ethics.

Carrie J. Menkel-Meadow is the A.B. Chettle, Jr. Professor of Dispute Resolution and Civil Procedure at the Georgetown University Law Center. She serves as co-editor of the Journal of Legal Education and the International Journal of Law in Context. She is the co-author of *What's Fair: Ethics for Negotiators* (2004) and *Lawyers and Legal Profession* (1987) and the author of *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. Miami L. Rev. 949 (2002) and *Ethics, Morality and Professional Responsibility in Negotiation, in Dispute Resolution Ethics: A Comprehensive Guide* 119 (2002).

Thomas D. Morgan is the Oppenheim Professor of Antitrust and Trade Regulation Law at the George Washington University Law School. He was selected by the American Law Institute as one of three professors to prepare its *Restatement of the Law, The Law Governing Lawyers* (2000) and by the ABA as one of three professors to draft revisions to its Model Rules of Professional Conduct. He is the co-author (with *amicus curiae* Ronald D. Rotunda) of *Problems and Materials on Professional Responsibility* (8th ed. 2003) and *Selected Standards on Professional Responsibility, Including California and New York Rules* (published annually since 1978).

Robert M. O'Neil is a Professor of Law at the University of Virginia, and served as President of the University of Virginia from 1985-1990. He has served as the President of the Virginia Council for Open Government and chair of the Council for America's First Freedom and a commission on the future of Virginia's judicial system. He is the author of *The First Amendment and Civil Liability* (2001), *Free Speech in the College Community* (1997), and *The Canons in the Courts: Recent First Amendment Rulings*, 35 Ind. L. Rev. 701 (2002).

Burnele Venable Powell is the Miles and Ann Loadholt Professor of Law at the University of South Carolina School of Law, where he served as Dean from 2004-2005. He has

served as Chair of the ABA Standing Committee on Professional Discipline and the ABA Joint Subcommittee on Implementation of Lawyer Disciplinary Enforcement, and as a Member of the ABA Commission on the Evaluation of the Rules for Professional Conduct, the ABA Standing Committee on Professionalism, the ABA Commission on Multidisciplinary Practice, and the ABA Commission on Public Financing of Judicial Campaigns. He is the co-author of *Lawyers and the Legal Profession: Cases and Materials* (4th ed. forthcoming).

Ronald D. Rotunda is a George Mason University Foundation Professor of Law at the George Mason University School of Law. He has served as Chair of the subcommittee that drafted the ABA Model Rules for Lawyer Disciplinary Enforcement and as a Member of the Publications Board of the ABA Center for Professional Responsibility and the ABA Standing Committee on Professional Discipline. He is the co-author (with *amicus curiae* Thomas D. Morgan) of *Problems and Materials on Professional Responsibility* (8th ed. 2003) and *Selected Standards on Professional Responsibility, Including California and New York Rules* (published annually since 1978), the co-author of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (3d ed. 2005), the author of *Modern Constitutional Law* (7th ed. 2003), and the co-author of the five-volume *Treatise on Constitutional Law* (3d ed. 1999).

Jeffrey M. Shaman is the St. Vincent de Paul Professor of Law at the DePaul University College of Law. He is the co-author (with *amici curiae* Steven Lubet and James J. Alfini) of *Judicial Conduct and Ethics* (3d ed. 2000).

The *amici curiae* support and urge the Court to grant the petition for a writ of certiorari. In their positions as legal scholars, committee members, and advisors on issues relating to judicial ethics and the First Amendment, the *amici curiae* are particularly aware of, affected by, and concerned by the confusion and inconsistency that has become pervasive

among lower courts, State regulatory authorities, and judicial candidates concerning the nature and scope of the restrictions that States may choose, consistent with the Federal Constitution, to impose upon the speech and conduct of candidates for state and local elected judicial offices. Notwithstanding this Court's decision in *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002), the confusion has continued to spread as the state courts and lower federal courts issue decisions, including the one in this case, that are fundamentally inconsistent and cannot be reconciled. As a result, there is a patchwork of federal and state court rulings in the place where there should be a uniform rule on a fundamental issue of federal constitutional law that is of profound national importance.

In the absence of further guidance from this Court, lower courts will continue to decide issues in a manner that either (a) interferes with the rights of the States to regulate the judicial selection process and to protect the integrity, impartiality, and independence of state court judicial systems or (b) infringes the First Amendment rights of candidates for elected office to communicate their views to voters, unimpeded by government regulation.

In supporting the petition for a writ of certiorari, the *amici curiae* do not take any position on the merits of the dispute.

REASONS FOR GRANTING THE PETITION

This case arises at the intersection of two fundamental and hallowed principles in our system of government under the Federal Constitution.

The first principle involved in this matter is State sovereignty. Each State has the sovereign right to make its own decisions regarding how to structure its state judicial system, including the manner in which judges will be selected, subject to the limitations of the Fourteenth Amendment. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)